92-1833

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

NO. 92 -

IN THE

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, JUSTICE OF THE
PENNSYLVANIA SUPREME COURT

HONORABLE ROLF LARSEN, PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Rolf Larsen, Pro Se
2800 Grant Building
Pittsburgh, Pennsylvania 15219
(412)-565-3000

3 FP

QUESTIONS PRESENTED

1. Whether the commingling of the investigative, prosecutorial and adjudicative functions in the quasi-criminal proceedings before the Pennsylvania Judicial Inquiry and Review Board violated the due process and equal protection guarantees of the U. S. Constitution and thus deprived the petitioner, Justice Rolf Larsen, of a fair and impartial hearing?

2. Whether, under the provisions of the United States Constitution, the petitioner Justice Rolf Larsen's constitutional right not to be twice placed in jeopardy and subject to multiple prosecutions on the same quasi-criminal charges was violated when the Pennsylvania Judicial Inquiry and Review Board unilaterally terminated the original hearing during the defense stage thereof and required the petitioner to re-defend the original charges ab initio in a consolidated hearing with new and unrelated quasi-criminal charges before a new hearing tribunal to which additional members were added?

3. Whether the Judicial Inquiry and Review Board's action in adding three new, unrelated charges (nos. III, IV and V) to the two original charges during the hearing on the original charges deprived the petitioner of his fundamental right to due process and equal protection of law under the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

Honorable Rolf Larsen, Justice of the Pennsylvania Supreme Court, Petitioner herein, Respondent below

Pennsylvania Judicial Inquiry and Review Board, Petitioner-Prosecutor below

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13

1. The commingling of the investigative, prosecutorial and adjudicative functions in the quasi-criminal proceedings before the Pennsylvania Judicial Inquiry and Review Board violated the due process and equal protection guarantees of the U. S. Constitution and thus deprived the petitioner, Justice Rolf Larsen, of a fair and impartial hearing..... 16

2. Under the provisions of the United States Constitution, the petitioner Justice Rolf Larsen's constitutional right not to be twice placed in jeopardy and subject to multiple prosecutions on the same quasi-criminal charges was violated when the Pennsylvania Judicial Inquiry and Review Board unilaterally terminated the original hearing during the defense stage thereof and required the petitioner to re-defend the original charges ab initio in a consolidated hearing with new and unrelated quasi-criminal charges before a new hearing tribunal to which additional members were added..... 22

TABLE OF CONTENTS (Continued)

Page

3. The Judicial Inquiry and Review Board's action in adding three new, unrelated charges (nos. III, IV and V) to the two original charges during the hearing on the original charges deprived the petitioner of his fundamental right to due process and equal protection of law under the United States Constitution..... 26

Conclusion 30

TABLE OF AUTHORITIES

United States Supreme Court cases PAGE

Benton v. Maryland, 395 U.S. 784, 89 S.Ct 2056, 23 L.Ed.2d 707 (1969) 25

Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) 16

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) 26

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, ... 16
99 L.Ed.2d 942 (1954) .....

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 1230 (1964) 28, 29

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) 26

United States v. Perez, 22 U.S. 579, 9 Wheat 579 (1824) 25

Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 1456, 43 L.Ed.2d 712 (1973) 17

Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) 21

Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1973) 19

Pennsylvania Cases: .....

First Amendment Coalition v. JIRB, 501 Pa. 129, 460 A.2d 722 (1983) 5, 20

Judicial Inquiry and Review Board v. Snyder, 514 Pa. 142, 523 A.2d 294 (1987) 28

Lohmiller v. Weidenbaugh, 302 Pa. Super. 174, 448 A.2d 583 (1982) *rev'd on other grounds*, 503 Pa. 329, 469 A.2d 578 (1983) 28

Matter of Braig, 520 Pa. 409, 554 A.2d 493 (1989). 21

Matter of Chiovero, 524 Pa. 87, 570 A.2d 57 (1990) 4, 21, 24, 28

Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979) 24, 28

Matter of Dandridge, 462 Pa. 67, 337 A.2d 885 (1975)24, 28

Matter of Larsen, 616 A 2nd 259 (Pa. 1992) 2

Matter of Sylvester, 521 Pa. 300, 555 A.2d 1202 (1989) 21

Trabue v. Walsh, 318 Pa. 391, 177 A. 815 (1935) 28

Constitutional and Statutory Provisions and Rules of Procedure: *Page*

United States Constitution, Fifth Amendment. . . 2, 24, 25
United States Constitution, Fourteenth Amendment Section 1. 3
28 U.S.C. sec. 1257(a). 2
Pennsylvania Constitution, Article 5, sec. 18. 4
Pennsylvania Rule of Civil Procedure 213.1. 28
Pennsylvania Rule of Criminal Procedure 229. 29

Rule 2 of the Pennsylvania Rules of Procedure Governing the Judicial Inquiry and Review Board. 27
Rule 8 of the Pennsylvania Rules of Procedure Governing the Judicial Inquiry and Review Board. 26
Rule 17 of the Pennsylvania Rules of Procedure Governing the Judicial Inquiry and Review Board. 11

In The

Supreme Court of the United States

October Term, 1992

NO. 92-

IN THE MATTER OF THE
HONORABLE ROLF LARSEN,
JUSTICE OF THE PENNSYLVANIA SUPREME COURT
Honorable Rolf Larsen, Petitioner.

PETITION FOR WRIT OF CERTIORARI

Petitioner above named respectfully prays that a writ of certiorari issue to review the Per Curiam Order of two Justices of the Pennsylvania Supreme Court, entered in this case on October 14, 1992, petition for reargument denied, by Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated January 22, 1993.

OPINIONS BELOW

Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated January 22, 1993, denying petitioner's Application for Reargument. Order is reprinted in Appendix at p.1.

Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated October 14, 1992, adopting Part II of the Report of the Judicial Inquiry and Review Board which recommended that petitioner receive a public reprimand. Justice Papadakos filed a Dissenting Statement. This order

is reported at 616 A. 2d 259 (Pa. 1992) and is reprinted in the Appendix at p.7.

Report of JIRB to the Supreme Court of Pennsylvania, Part I, filed July 17, 1992. Report, Part I is reprinted in the Appendix at p.74.

Report of JIRB to the Supreme Court of Pennsylvania, Part II, filed July 17, 1992. Report Part II is reprinted as part of the Per Curiam Order of October 14, 1992 in Appendix at p.7.

Dissenting and Joining Report of Judge Munley, filed July 17, 1992. The dissenting and joining report is reprinted in the Appendix at p.104.

JURISDICTION

The Per Curiam Order of two Justices of the Pennsylvania Supreme Court printed in the Appendix at p.7, was entered on October 14, 1992. On January 22, 1993, two Justices of the Pennsylvania Supreme Court denied petitioner's application for reargument which is printed at Appendix p.1. Jurisdiction in this Court is established by 28 U.S.C. sec. 1257(a). The time for filing this petition was extended to May 13, 1993, by order dated April 21, 1993 entered by Justice David H. Souter.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendent.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added).

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Justice Rolf Larsen, is a sitting Justice of the Pennsylvania Supreme Court. On May 24, 1988, the petitioner was formally charged by the Pennsylvania Judicial Inquiry and Review Board (JIRB) [1], with two counts of violating the Canons of the Code of Judicial Conduct, in a quasi-criminal proceeding.[2] The petitioner was charged in relevant part with: violating the Judicial Code by allegedly engaging in an *ex parte* contact with Common Pleas Court Judge Eunice L. Ross concerning a proceeding involving the Estate of Homer Douglas Francis then pending before her.

The JIRB is a governmental body established by the Pennsylvania Constitution (Art. 5, sec. 18) (See Note 1). The JIRB is invested by the Pennsylvania Constitution with the responsibility of investigating behavior of members of the Pennsylvania Judiciary, holding hearings and, if warranted, recommending, to the Pennsylvania Supreme Court, sanctions of suspension, removal, discipline and/or compulsory retirement of justices and judges. Upon receiving such a recommendation the Pennsylvania Supreme Court is obliged to make a de novo review and arrive at its own independent

[1] Article 5, sec. 18 of the Pennsylvania Constitution, which establishes the Judicial Inquiry and Review Board, provides in part as follows:

> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. . . . The board shall act only with the concurrence of a majority of its members.
>
> • • • •

[2] The Pennsylvania Supreme Court has held that proceedings conducted by the JIRB are "quasi- criminal" in nature, and that a respondent-jurist before the JIRB is clothed with all of the fundamental constitutional rights afforded to criminal defendants. *Matter of Chiovero*, 524 Pa. 87, 570 A.2d 57 (1990).

conclusion. If the JIRB exonerates the accused justice or judge of the charge or charges, then the JIRB's determination of exoneration is final and unreviewable. *First Amendment Coalition vs. Judicial Inquiry and Review Board,* 501 Pa. 128, 460 A. 2d 722 (1983).

In September, 1987, Judge Eunice L. Ross made a complaint to Robert L. Keuch, Esquire, the Executor Director, Board Counsel and prosecutor of the JIRB that the petitioner had engaged in an *ex parte* contact with her on May 30, 1986, some 16 months prior to her making the complaint. At the time she made the complaint, Judge Ross was a member of the JIRB and she had participated, as a member of the JIRB, in the investigation and the gathering of the evidence against the petitioner. Judge Ross then testified as the principal witness against the petitioner in a hearing conducted by her fellow JIRB members.

On or about June 15, 1988, the petitioner filed a pre- hearing challenge in the form of an Application for Disqualification of all members of the Judicial Inquiry and Review Board. The application for disqualification of all members of the JIRB was based upon, *inter alia,* the clear assertion that the JIRB, which is a collegial, adjudicatory body and constitutionally acts as a unit, could not fairly and impartially judge the credibility of Judge Eunice L. Ross, one of its own members. The petitioner argued to the JIRB that no tribunal can fairly or impartially sit in judgment of part or all of its own credibility; nor can any tribunal separate itself into "good parts and bad parts" because the "bad parts" irrevocably contaminate the whole. A copy of the petitioner's Application for Disqualification of all Members of the Judicial Inquiry and Review Board is reprinted in the Appendix at p.151. The petitioner's said application for disqualification was summarily denied without a hearing by the JIRB.

On or about, July 29, 1988, the petitioner filed an Application for Writ of Prohibition and/or Application for Extraordinary Relief along with an Application for Stay of Judical Inquiry and Review Board Proceedings Pending Dispositon of the Applications for Writ of Prohibition and for Extraordinary Relief in the Supreme Court of Pennsylvania. In that application, the petitioner argued, *inter alia*, that his right to a fair and impartial hearing was rendered impossible by

the commingling of the investigatory, charging, prosecutorial, fact-finding, adjudicative and judicial functions in the JIRB. Judge Ross was at all times the complainant, a member of the JIRB, an investigator, an initiator of charges and a witness. The same members of the JIRB who investigated the complaint and voted to charge the petitioner then proceeded to hear and receive the testimony and evidence on the charges which they decided to bring. (Judge Ross recused herself from participating in the main hearing phase of the proceedings except to appear as the principal witness.) The petitioner argued that the extensive commingling of functions had the effect of denying him due process of the law before a fair and impartial tribunal and equal protection as quaranteed by the Fourteenth Amendment of the federal constitution. The petitioner application for a Writ of Prohibition, etc. was summarily denied without a hearing. A copy of the said Application for Writ of Prohibition, etc., and a copy of the court's said order denying the relief sought are reprinted in the Appendix at p.162, and p.181, respectively.

The evidentiary hearings in this matter commenced on August 23, 1988, before a three member hearing committee of the JIRB. After ten days of hearings (August 22, 23, 24, 29, 30, 31, September 1, 12, 13 and 14), 13 witnesses for the JIRB, 16 witnesses for the petitioner, 45 exhibits for the JIRB, 41 exhibits for the petitioner, 1,704 pages of testimony, and stipulated testimony furnished on behalf of the petitioner in writing by 18 additional character witnesses, and after the JIRB had rested its case and the petitioner had started his defense, a recess was called by the hearing committee. The hearings were to resume on Wednesday, October 5, 1988, at which time the petitioner would continue to present the remainder of his defense.

On October 3, 1988, two days before hearings were to resume, the JIRB, acting through the Executive Director/Board Counsel-prosecutor, Robert L. Keuch, and three of its members, who were not serving on the original three-member hearing committee, acting *ex parte,* filed three new unrelated charges (Charges III, IV and V) against the petitioner. These three new unrelated charges were added to the two original charges. The three new charges alleged that

the petitioner had violated the Code of Judicial Conduct by alleged conduct which was totally unrelated to charges I and II. The new charges III, IV and V, involved allegations pertaining to entirely different times, places, subject matter and parties from the times, places, subject matter and parties allegedly involved in the formal charges I and II then being heard by the hearing committee. The hearing committee members, who were hearing the initial formal charges I and II, were informed by Mr. Keuch and the other members of the JIRB of the three new charges made against the petitioner. This disclosure irreversibly polluted the hearings and the petitioner was irreversibly prejudiced thereby.

The petitioner, through his counsel, orally objected on various grounds to the filing of the three new unrelated charges. Included in his objections was the denial of due process and the undeniable prejudice caused by the joinder of entirely new and unrelated charges. On October 10, 1988, oral argument on petitioner's objections was held before a specially convened six-member-panel of the JIRB which included the three members of the original hearing committee. The following day, October 11, 1988, the specially convened six member panel of the JIRB issued an order overruling petitioner's objections, and ordered the hearing committee, then conducting hearings on charges I and II, to suspend the hearings on those original charges. The Order further provided:

"In the event the JIRB concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140[3], and all charges shall be heard *ab initio* by the six sitting members." See Appendix at p.286.

On or about October 20, 1988, the petitioner, to supplement a letter of October 13, 1988 in the nature of various pretrial motions and objections to the JIRB order of October 11, 1988 cited above, filed a Supplemental Omnibus Application with the JIRB which, *inter alia,* included an application to dismiss the original charges I and II on grounds of

3 Docket Number 140 is the docket number assigned to petitioner's case by the JIRB.

double jeopardy if the JIRB order of October 11, 1988 cited above was executed. The quasi-criminal hearing on charges I and II which had progressed well into the defense stage was unilaterally and abruptly aborted by the JIRB without necessitous reason and over the strenuous objections of the petitioner. A copy of said Omnibus Application is reprinted, with exhibits omitted, in the Appendix at p.184.

On October 24, 1988, the JIRB ordered a consolidated hearing *ab initio* on the original charges (charges I and II) and the new charges (charges III, IV and V). By *order of the JIRB* dated October 31, 1988 and signed and *executed by the Executive Director/Board Counsel-prosecutor, Robert L. Keuch, Esquire,* all of petitioner's applications and requests set forth in petitioner's said Supplemental Omnibus Application (filed October 20, 1988), including his request for dismissal of charges I and II on the grounds of double jeopardy, were denied. A copy of said JIRB order is reprinted in the Appendix at p.287. Mr. Keuch participated in the investigation, interviewed witnesses, served as advisor to the JIRB, served as prosecuting attorney on behalf of the JIRB, and made adjudicative decisions for the JIRB. From time to time, Mr. Keuch removed his "prosecutor hat" and put on his "judicial hat" and performed judicial functions, e.g., the signing of the aforementioned order of October 31, 1988, denying the petitioner's motion, see Appendix at p.283; the signing of the order of June 29, 1988 denying petitioner's application for disqualification of all members of the JIRB (reprinted in the Appendix at p.213); the signing of the order of July 5, 1988 granting petitioner's motion for a continuance (reprinted in Appendix at p.214), or he donned his "administrative hat" e.g., his review and discussion of the initiation of new charges against the petitioner with all of the members of the JIRB and the hearing committee; the issuance of Notice of Hearing on behalf of the JIRB (Notice of Hearing to be held on November 14, 1988 is reprinted in the Appendix at p.215).

On November 3, 1988, the petitioner filed a Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief in the Pennsylvania Supreme Court. In that second application the petitioner again requested, inter alia, that the original charges I and II be

dismissed on double jeopardy grounds. A copy the "Second Applications" is reprinted (exhibits omitted) in the Appendix at p.216.

On or about November 23, 1988, the petitioner filed Amendments to the Second Application for Writ of Prohibition and/or the Second Application for Extraordinary Relief in the Pennsylvania Supreme Court. A copy of petitioner's Amendments to the Second Application is reprinted (exhibits omitted) in the Appendix at p.260. By Per Curiam order of December 21, 1988, the Pennsylvania Supreme Court summarily denied petitioner's second application for writ of prohibition and/or second application for extraordinary relief, as amended. A copy of said order is reprinted in the Appendix at p.277. Petitioner's timely application for reconsideration was summarily denied by Per Curiam Order dated January 6, 1989.

On March 15, 1989, the consolidated hearing commenced ab initio before a further enlarged hearing committee which now had nine sitting members—seven who were members of the JIRB and two who were former members of the JIRB. Following the close of the hearings oral arguments were heard by the JIRB on July 25, 1989.

In the midst of deliberations by the expanded hearing committee, the JIRB (which included the hearing committee members), through its prosecutor, Robert L. Keuch, notified the petitioner by letter dated January 26, 1990, that the JIRB, with all members participating, had initiated an additional investigation into his conduct involving a sixth and seventh inquiry. On February 20, 1990, the petitioner filed a verified initial response with the JIRB which, *inter alia*, contained averments of commingling of functions, which response was also filed and made a part of the within case. On March 12, 1990, the petitioner filed a sworn supplemental response with the JIRB which, *inter alia*, included: additional averments of commingling of functions. The said supplemental response was also filed in and made a part of the within case.

Eventually, after the petitioner had filed a specific answer of denial to the sixth and seventh inquiries, the said investigation was ended. Additional damage nonetheless was done. Prosecutor Robert L. Keuch, Esquire, had provided

all of the JIRB members, which included the hearing committee members with the information concerning the said investigation of allegations of inappropriate conduct. The JIRB members and hearing committee members received that information and acted upon it. Thus, the JIRB was now further contaminated by the knowledge that the petitioner was the subject of another investigation, even though it eventually proved to be totally unfounded.

On July 17, 1991, a purported Report of the JIRB to the Pennsylvania Supreme Court, Part I, joined by Chairman Bruce W. Kauffman, James H. Higgins, Lawrence T. Hoyle, Jr., Esquire and Antonia L. Scarlata was filed. Those who joined in Part I exonerated the petitioner on charges II, III, IV and V, but concluded that the alleged conduct of the petitioner as to charge I (one of the double jeopardy charges) violated Canon 2 because he failed to avoid the appearance of impropriety as to charge I. A copy of that Report, Part I is reprinted in the Appendix at p.74. On that same day, a *purported* Report of the JIRB to the Pennsylvania Supreme Court, Part II, joined by Judge Frank J. Montemuro, Judge Jessamine S. Jiuliante, Judge John T.J. Kelly, Jr. and Judge Joseph M. James was filed. Those who joined in Part II likewise exonerated the petitioner on charges II, III, IV and V, but concluded that the petitioner had violated Canon 2 by providing a "prohibited *ex parte* 'tip' concerning the Estate of Francis case to Judge Ross," and that the alleged conduct warranted discipline "despite the absence of an improper motive," because the alleged conduct raised an appearance of impropriety as to charge I (the double jeopardy charge). A copy of that report, Part II is reprinted with the Per Curiam Order of October 14, 1992 in the Appendix p.7. Neither Part I nor Part II of the Report of the JIRB addressed the due process and equal protection violations and deprivations cited by the petitioner which had been expressly deferred to the Pennsylvania Supreme Court. Judge James M. Munley authored and filed a Dissenting and Joining Report in which he found no basis for any violation on the part of the petitioner and stated that he would dismiss the proceedings against the petitioner and exonerate petitioner on all charges. A copy of Judge Munley's Dissenting and Joining Report is reprinted in the Appendix at p.104.

On or about December 18, 1991, the petitioner filed in the Pennsylvania Supreme Court a Petition pursuant to Rule 17 of the Rules of Procedure Governing the Judicial Inquiry and Review Board.[4] In that Rule 17 Petition, the petitioner argued, *inter alia,* that he had been deprived of a fair and impartial hearing in direct contravention of the U.S. Constitution by the impermissible commingling of the investigatory, charging, prosecutorial, fact-finding, adjudicative and judicial functions in the same members of the JIRB. Additionally, the petitioner argued, *inter alia,* that his federal constitutional right to not be twice placed in jeopardy was violated when the hearing on the two original charges was abruptly aborted by the orders of the JIRB of October 11, 1988 and October 24, 1988, and he was made to re-defend against those same two charges in a new consolidated hearing with three other charges. The petitioner also argued that he was denied due process when the three new charges were added while he was defending the initial charges.

After briefing, this matter was argued on May 9, 1992 before four members of the Pennsylvania Supreme Court: Justices McDermott, Zappala, Papadakos and Cappy. Chief Justice Nix and Justice Flaherty recused themselves on the day of the argument. On June 18, 1992, while the case was being considered, Justice McDermott died thus leaving a three-member Supreme Court to consider petitioner's case. On October 14, 1992, in a Per Curiam Order, two Justices of the Pennsylvania Supreme Court adopted the Report of the JIRB, Part II and the recommendation contained therein that the petitioner receive a public reprimand, based upon the finding that, notwithstanding the *lack of improper motive*, the petitioner engaged in an *ex parte* communication prohibited by Canon 2 of the Code of Judical Conduct by

4 RULE 17. REVIEW OF BOARD PROCEEDINGS

(a) A Petition to the Supreme Court to modify or reject the recommendations of the Board may be filed within thirty (30) days after the filing with the Prothonotary of the Supreme Court of a certified copy of the recommendation complained of. The petition shall be verified, shall be based on the record, and shall specify the grounds relied on.

providing information to a Common Pleas Court Judge (Judge Ross) relating to a matter that was pending before her and thus created an appearance of impropriety—the double jeopardy charge. A copy of the said Per Curiam order with Appendix is reprinted in the Appendix at p.7. The two Justices, in entering the Per Curiam Order, failed to conduct the required *de novo* review and failed to address the due process and equal protection violations of the U. S. Constitution relating to the commingling of functions, double jeopardy, and the adding of three new unrelated charges in the midst of an ongoing quasi-criminal hearing. Thus, while the two Justices adopted the Report of the JIRB, Part II, in the Per Curiam Order, of October 14, 1992 they failed to address the constitutional due process and equal protection issues raised by the petitioner. Those critical issues had been specifically left to the Pennsylvania Supreme Court for review and resolution by the very Report which the two Justices adopted in their said Per Curiam Order. Justice Papadakos filed a dissenting statement wherein he noted that the constitutional infirmities committed by the JIRB can only be "exonerated" by remanding for new hearings on the one charge submitted to the court. A copy of the said dissenting statement is reprinted in the Appendix at p.4.

On or about November 25, 1992, the petitioner filed an Application for Reargument seeking to have the court reconsider the Per Curiam Order of October 14, 1992, and to have the court address the various constitutional due process and equal protection violations raised throughout the proceedings by the petitioner. In another Per Curiam Order of the two Justices dated January 22, 1993, the Application for Reargument was denied without addressing the said due process and equal protection violations raised by the petitioner. Justice Papakakos dissented. A copy of the said Per Curiam order is reprinted in the Appendix at p.1. As a result, the petitioner was subjected to a public reprimand. A copy of the Reprimand is reprinted in the Appendix at p.72.

Thus, the petitioner has not had any "day in court" on the various constitutional due process and equal protection violations he has raised and re-raised since the outset of these proceedings. The JIRB refused to consider these issues, specificially leaving consideration and resolution of

same to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court in turn, refused, without comment, to address these important constitutional issues leaving the petitioner to seek redress in this Honorable Court. Without this redress, the petitioner will have suffered two injustices: the first of these injustices arises because the petitioner is completely innocent of the charge; and the second arises because of the constitutionally defective procedures, hearings, reviews, appeals, etc. which were used to reach the unjust result. Further, society will have suffered an injustice in that the integrity of the judiciary will have been further eroded.

REASONS FOR GRANTING THE WRIT

The Per Curiam Order of two Justices of the Pennsylvania Supreme Court which ordered a reprimand of the petitioner should be reviewed by the United States Supreme Court because that order was entered in direct violation of the petitioner's fundamental rights under the Fourteenth Amendment of the United States Constitution. The petitioner's rights to due process and equal protection of the law guaranteed by the United States Constitution have been abused and violated at every stage of the proceedings against him. From the outset, the proceedings commenced in a constitutionally impaired manner when, in September, 1987, JIRB member and Common Court Pleas Judge Eunice L. Ross made a belated complaint against the petitioner which pertained to a visit the petitioner made to her on May 30, 1986. The complaint was made to the JIRB, the body of which she was a member, by a communication to Robert L. Keuch, Esquire, the Executive Director and Board Counsel. Previously, Judge Ross had voted with her fellow JIRB members, to initiate an investigation of the petitioner based upon newspaper stories that appeared in Pittsburgh and Greensburg newspapers in April, 1987. Those newspaper stories related to a real estate purchase made by the petitioner which Judge Ross said she then associated with the petitioner's May 30, 1986 visit to her. Judge Ross, thus, had participated in an investigation of the facts which,

in her view, directly related to her complaint against the petitioner. After making a complaint and being involved in the investigation of the petitioner, Judge Ross assumed the role of principal prosecuting witness at the hearings before her fellow JIRB members on the charges which she instigated by her complaint.

The impermissible commingling of functions which punctuated the initiation of charges against the petitioner continued in an extremely virulent form throughout the entire proceedings. The Executive Director and Board Counsel of the JIRB, Robert L. Keuch, Esquire, not only served as the lead prosecuting attorney in the petitioner's hearings, but Mr. Keuch was also involved in the investigation and, in addition, discharged adjudicative and administrative functions directly related to the petitioner and the proceedings against the petitioner. Additionally, the JIRB members as a body, voted in and participated in: the investigation of the petitioner, the charging of the petitioner, the trial of the petitioner, and the adjudication of the charges against the petitioner. This blatant commingling of functions which prejudiced the petitioner and deprived him a fair hearing in this case, has been condemned as violative of traditional notions of constitutional due process and equal protection.

The independence of the judiciary and confidence in the judicial system is threatened when a jurist on the highest court in the Commonwealth of Pennsylvania is systematically deprived of the fundamental rights of due process and equal protection of the law guaranteed to **all** citizens by the Fourteenth Amendment of the United States Constitution. The constitutional assurances of due process and equal protection are perceived as empty promises when these cherished rights are denied to a Justice of the Pennsylvania Supreme Court. The perception that will prevail is: if a man who is at the pinnacle of the judiciary in the Commonwealth of Pennsylvania can be denied his constitutional rights without redress, then who among us can be assured that his or her constitutional rights will be respected and protected?

Additionally, this Honorable Court should grant a Writ of Certiorari in this case in order to review the proceedings which resulted in the overt violation of petitioner's right to

not be twice placed in jeopardy. The proceedings against the petitioner in this matter are "quasi-criminal" in nature, and as such, the petitioner is entitled to all of the fundamental constitutional rights that are available to accused criminal defendants. The JIRB and its Executive Director/Board Counsel prosecutor, Robert L. Keuch, Esquire, observing that the evidence and testimony provided by the primary witness, Judge Ross, lacked credibility and was woefully inadequate to meet the standard of "clear and convincing" evidence of the charges, unilaterally aborted the hearings, added three new unrelated charges to the original two charges, and required the petitioner to defend himself for a second time on the original charges while defending himself on the three new charges in a consolidated hearing *ab initio*. No manifest necessity existed to justify the aborting of the petitioner's original hearing on the original two charges, thus petitioner cannot constitutionally be retried on the original two charges. The petitioner was, nevertheless, retired and was required to defend himself for a second time on the original two charges in direct contravention of that constitutional prohibition.

Finally, this Honorable Court should grant a Writ of Certiorari in this case to review the JIRB's action in adding three new unrelated charges to the original two charges during the course of the hearing on the two original charges, Such overreaching on the part of the prosecution is violative of petitioner's due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution in two ways. First, the adding of the three new unrelated charges while the petitioner was in the midst of presenting his defense on the original two charges failed to provide him with fair notice of the new charges. Second, the adding of the three new unrelated charges, as described, prejudiced the petitioner on the original two charges because the hearing, on the original two charges, was now irreversibly contaminated by the introduction of extraneous unrelated charges while the petitioner was successfully defending the original two charges.

1. THE COMMINGLING OF THE INVESTIGATIVE, PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS IN THE QUASI-CRIMINAL PROCEEDINGS BEFORE THE PENNSYLVANIA JUDICIAL INQUIRY AND REVIEW BOARD VIOLATED THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES CONSTITUTION AND THUS DEPRIVED THE PETITIONER, JUSTICE ROLF LARSEN, OF A FAIR AND IMPARTIAL HEARING

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison* , 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1954). This fundamental principle applies to administrative proceedings which have the power to make adjudications. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct 1689, 36 L.Ed 2d 488 (1973); "[No] man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* 75 S.Ct. at 625. The decision to make an accusation by way of a complaint against another is a decision which necessarily involves a determination that there is good cause to believe that the one against whom the complaint is made is guilty of some wrongdoing, otherwise no accusatory complaint would be filed. Thus, when Judge Eunice L. Ross made the decision to lodge a complaint with the JIRB against the petitioner, she had already determined that the petitioner had engaged in some wrongful conduct. Such a predetermination of misconduct could not be forgotten by Judge Ross when she stepped out of her role as complainant and assumed her role as a JIRB member and, along with her fellow members, participated in a review of the underlying facts of the complaint she made against the petitioner. It is serious constitutional error to permit a procedure where the person who makes the accusation of misconduct participates in the investigation of that accused party where the alleged conduct is connected to the complaint, whether the investigation precedes or follows the complaint. "When constitutional error calls into question the objectivity of those charged with

bringing [an accused] to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S.Ct 671, 623, 88 L.Ed 2d 598, (1986). The harm to the petitioner was magnified even more when Judge Ross moved from her role as JIRB member, who participated in the review of the accusations she had made, to the role of principal prosecution witness before the hearing committee of the JIRB whose members were the very people Judge Ross deliberated with on this and other matters before the JIRB.

The JIRB impermissibly commingled the investigative, prosecutorial, charging, adjudicative, advice-giving, fact-finding and judicial functions in the proceedings against the petitioner in direct contravention of petitoner's federal conteed by the Fourteenth Amendment. The JIRB installed Robert L. Keuch, Esquire in the dual positions of Executive Director and General Counsel, and further, impermissibly bestowed upon the said Executive Director and General Counsel the commingled powers of *investigator, prosecutor, advisor to the Board, legal counsel to the Board, administrator of the directions and orders of the Board, enforcer of the directions and orders of the Board, and Judge who makes and executes orders,* all of which said Executive Director/Board Counsel unlawfully exercised throughout the proceedings against the petitioner in direct violation of the Fourteenth Amendment of the U. S. Constitution. The various functions of the JIRB are so commingled as to oblige the same people to serve as investigators, initiators of formal charges, prosecutors, and adjudicators. This not only undermines fairness, it destroys any confidence that the petitioner could and would receive a fair hearing. The decisions of the JIRB affecting the substantial rights of the petitioner, including rulings on various motions made pre-hearing, throughout the hearing and post hearing lie under the suspicion of being mere rationalizations of the preliminary findings which the JIRB presented to itself. How could the JIRB exonerate the petitioner after having itself invested over six years of its time, money and considerable resources in attempting to convict the petitioner?

Additionally, throughout the proceedings against the petitioner, Executive Director/Board Counsel-prosecutor Robert

L. Keuch, Esquire was in continuous *ex parte* contact with all members of the original hearing committee, all members of the expanded hearing committee and all members of the JIRB. In the proceedings against the petitioner, it was the JIRB which procured and interviewed the witnesses, which made the decision to institute proceedings alleging misconduct against the petitioner, and which was charged with the responsibility and power to hear, observe and determine the credibility of all witnesses it had procured and interviewed (one of those witnesses was Judge Ross, a fellow member of the JIRB), and to resolve all issues of credibility (including the credibility of Judge Ross), along with making a determination of guilt or innocence. Even though Judge Ross recused herself from participating as a JIRB member in the actual hearings in petitioner's case, Judge Ross continued to function as a JIRB member and hearing committee member in all other matters coming before the JIRB . . . all the while her credibility was being determined by her fellow JIRB members. Thus, simultaneously while Judge Ross was a witness in petitioner's case, she was also hearing cases, making recommendations and voting in all other cases before the JIRB. The aforementioned impermissible commingling of functions referred to above has resulted in the petitioner being deprived of due process and equal protection of law guaranteed him by the Fourteenth Amendment of the U.S. Constitution.

The taint, unfairness, lack of justice, and lack of due process of law interwoven with the impermissibly commingled investigative, charging, prosecutorial, adjudicative, fact-finding and judicial functions all carried out by the JIRB and its Executive Director/Board Counsel-prosecutor was further supported by the former chairman of that JIRB, Judge Edmund B. Spaeth, Jr., in his letter of resignation from the Board dated March 3, 1990, in which he cited the unfairness of the JIRB's procedures because of the commingling of functions as the chief reason for his resignation. See Appendix at p.278.

The JIRB admits that the JIRB itself, and through its staff, exercised investigative, prosecutorial and adjudicative functions throughout the proceedings against the petitioner. The JIRB contends however that the exercise of these

commingled functions is not violative of petitioner's constitutional rights to due process, equal protection and a fair hearing before a fair and impartial tribunal. In support of its position, the JIRB cites *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1973). In *Withrow*, the Court said it is not violative of due process for the members of an administrative agency to investigate the facts, institute proceedings, and then make the necessary adjudications. *Id.*, 421 U.S. at 53. The petitioner's case, however, involves more than merely the JIRB investigating the facts, instituting the proceedings and making the adjudications. In *Withrow*, the Court also observed: [W]e should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. . . . The mere exposure to evidence presented in nonadversary investigating procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. *Id.* 421 U.S. 54-55.

In the petitioner's case, the complaint was made by a JIRB member, and that JIRB member participated in the nonadversarial investigation of that complaint against the petitioner. Furthermore, the lead prosecuting attorney was in continual *ex parte* communication with all members of the hearing committee and the JIRB during the course of the hearings, and he discharged adjudicatory functions. Thus, in the petitioner's case, there is a specific foundation for suspecting that the JIRB was prejudiced and would be disabled from fairly hearing and fairly deciding the charges against the petitioner on the basis of the evidence presented. See *Withrow v. Larkin*, supra.

Additionally, in the arguments before the Pennsylvania Supreme Court, the JIRB argued that the petitioner's federal constitutional rights were not violated by the commingling of functions in the JIRB and the office of Executive Director/Board Counsel-prosecutor because the JIRB's authority is limited to making a recommendation to the Pennsylvania Supreme Court which recommendation has no binding effect. The theory is that since the JIRB's recommendation of discipline is not final and it is the Pennsylvania Supreme Court which makes the final determination as

to whether discipline is warranted, the commingling of functions within the JIRB is permissible. The Board argues that, in the end, the Court's review will serve to overcome any violation of petitioner's constitutional rights suffered at the hands of the JIRB. That theory and argument fail to acknowledge that the JIRB had and has substantial powers to render final and binding decisions in critical and important areas including the decisive and final power to exonerate the petitioner. When the JIRB decides to exonerate an accused jurist such as the petitioner in this case, it is a final and non-reviewable adjudication. [5] Contrary to the JIRB's assertion that the JIRB cannot issue final adjudications, the decision to exonerate is a final adjudication and, in such case, the Pennsylvania Supreme Court has no authority to review or even see the record of the exoneration. [6] The petitioner has the constitutional and fundamental right to have the opportunity to an unreviewable adjudication of exoneration (not guilty) decided by a fair and impartial Board, untainted by bias and prejudice, and uncorrupted by the commingling of the investigative, charging, prosecutorial and adjudicative functions to the extent that such commingling occurred in this case.

Additionally, in the history of the JIRB and JIRB proceedings, where the JIRB has determined that good cause for a recommendation exists and has made a recommendation to the Pennsylvania Supreme Court, the said Supreme Court has *never rejected or reversed* the JIRB's determination on an issue involving the *credibility* of a witness or witnesses. Thus, for all practical intents and purposes, the JIRB is the final arbiter of the credibility of witnesses. In essence and effect, the JIRB, in these proceedings, acted as the final arbiter of the credibility of Judge Eunice Ross, one of its own members, thus depriving the petitioner of his right to a neutral and detached judge and a fair, unbiased and impartial hearing.

5 First Amendment Coalition v. JIRB, 501 Pa. 129, 460 A.2d 722 (1983).

6 *Id.*

Every man is "entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 34 L.Ed2d 267 (1972). A State's trial procedure may not be deemed constitutionally acceptable "simply because the State eventually offers a [litigant] an impartial adjudication." *Id.* 489 U.S. at p. 61. Thus, the Board's impermissible commingling of the investigative, prosecutorial, charging, adjudicative, fact-finding and judicial functions cannot be deemed to be harmless because, when a recommendation of sanctions is made by the JIRB, the petitioner is entitled to a de novo review in the Supreme Court. The provision for a *de novo* review cannot cure the prior violations and deprivations of petitioner's rights in that the petitioner is constitutionally entitled to a neutral and detached tribunal in the *first instance* and not just somewhere along the way. *Id.* The fact that an impartial adjudication is eventually offered to the petitioner does not render acceptable, a constitutionally defective procedure before the JIRB. *Id.*

It must be emphasized that the Pennsylvania Supreme Court did not make the required *de novo* review in this case; the two Justices (in a 2-1 vote) simply adopted the Report of the JIRB, Part II, and the recommendation contained therein. Since 1968, the Pennsylvania Constitution has mandated that the Pennsylvania Supreme Court conduct a *de novo* review of any recommendation made by the JIRB. In every other case which has come before the court on a recommendation by the JIRB, a detailed *de novo* review was conducted by the court and specifically set forth in an opinion. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Sylvester*, 521 Pa. 300, 555 A.2d 1202 (1989); *Matter of Braig*, 520 Pa. 409, 554 A.2d 493 (1989). The Per Curiam Order of the two Justices adjuducates the petitioner's case in a summary fashion, without the two Justices conducting a *de novo* review contrary to the mandate of the Pennsylvania Constitution and in violation of the due process and equal protection guarantees of the United States Constitution.

concerned allegations of wholly unrelated and completely separate conduct of petitioner, alleged to have been carried out by the petitioner some two to four years prior to the time frame of the original charges and allegedly involving separate and distinct parties, dates, times, proceedings and subject matter.

As noted *supra*, proceedings before the JIRB are quasi-criminal proceedings. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885, (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, (1979). The quasi-criminal nature of the proceedings against the petitioner in this case raises the plethora of all the protections afforded to every person charged with a criminal offense. *Matter of Chiovero*, *supra*; *Judicial Inquiry and Review Board v. Synder*, 514 Pa. 142, 523 A.2d 294, 300-01 (1987) (concurring and dissenting opinion, McDermott, J.) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded at the very least, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.") Additionally, the Pennsylvania Supreme Court has held that the rules of procedure which govern the JIRB must "be meticulously observed." *Matter of Chiovero*, 570 A.2d at 61.

The procedure used by the JIRB in adding three new unrelated charges against the petitioner undoubtedly violated the rules 2 and 8 of procedure governing the JIRB.

Such joinders are also prohibited in civil and criminal proceedings because of prejudice. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *See* Pa. R. Civ. P. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) *Lohmiller v. Widenbaugh, 302 Pa .Super. 174, 448 A.2d 583 (1982), rev'd on other grounds*, 503 Pa. 329, 469 A.2d 578 (1983). See Rule 229 Pa. R. Crim. Pro.

More importantly, the United States Supreme Court has declared that an accused in a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the accused are *added* during disciplinary proceedings based on evidence adduced at said proceedings. *In Re*

2. UNDER THE PROVISIONS OF THE UNITED STATES CONSTITUTION THE PETITIONER JUSTICE ROLF LARSEN'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PLACED IN JEOPARDY AND SUBJECT TO MULTIPLE PROSECUTIONS ON THE SAME QUASI-CRIMINAL CHARGES WAS VIOLATED WHEN THE PENNSYLVANIA JUDICIAL INQUIRY AND REVIEW BOARD UNILATERALLY TERMINATED THE ORIGINAL HEARING DURING THE DEFENSE STAGE THEREOF AND REQUIRED THE PETITIONER TO RE-DEFEND THE ORIGINAL CHARGES AB INITIO IN A CONSOLIDATED HEARING WITH NEW AND UNRELATED QUASI-CRIMINAL CHARGES BEFORE A HEARING TRIBUNAL TO WHICH ADDITIONAL MEMBERS WERE ADDED

From the commencement of the proceedings against the petitioner, the petitioner was required to expend considerable time, energy and personal and financial resources to defend himself against the two original specific charges leveled in the notice of formal proceedings of May 24, 1988, which charges resulted from an investigation that had commenced in or about May, 1987. The evidentiary hearings on the original charges commenced on August 22, 1988, and after 13 days of hearings, 13 witnesses for the Board, 16 witnesses for the petitioner, 45 exhibits for the Board, 41 exhibits for the petitioner, 1704 pages of testimony and stipulated testimony furnished in writing on behalf of the petitioner by 18 additional character witnesses, the JIRB, on October 4, 1988, unilaterally and arbitrarily suspended the hearings by an order dated October 11, 1988. That said order of the JIRB of October 11, 1988, further stated: "In the event the JIRB concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

On October 24, 1988, the JIRB, terminated the original hearings by ordering a consolidated hearing *ab initio* on the original two charges and three new unrelated charges which the Board had filed on October 3, 1988. The orders of the

JIRB of October 11, 1988 and October 24, 1988 (along with an order of October 31, 1988 which denied petitioner's challenge to the Board's action), *sua sponte* aborted the hearings on the two original charges (in effect, declared a "mistrial") without cause of necessitous and compelling nature, and unconstitutionally compelled the petitioner to stand trial anew (a second time) on the original charges despite the enormous amount of time and energy and the enormous personal and financial resources the petitioner had been forced to expend up to that time in order to defend against the original charges. The record demonstrates that from the commencement of the hearings up to October 3, 1988, the respondent was prevailing on the merits of the original charges, and that the extraordinary, unprecedented, illegal and unheard of procedure directed by the six member panel of the Board on October 11, 1988 and by Executive Director/Board Counsel-prosecutor Robert L. Keuch on October 24, 1988 was to short-circuit those proceedings, and further was designed to attempt to ensure the participation of Chairman Bruce W. Kauffman in the proceedings against the petitioner so that he, Chairman Kauffman, could continue to orchestrate the proceedings to the petitioner's disadvantage and cast his vote to find the petitioner guilty of misconduct all in violation of the petitioner's federal constitutional right, guaranteed him by the Fourteenth Amendment, not to be twice placed in jeopardy of prosecution (and punishment) for the same alleged offense or misconduct. (See Affidavit of Richard A. Sprague, Esquire reprinted in Appendix at p.283).

Proceedings before the JIRB are quasi-criminal in nature. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979); Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885 (1975). In such quasi-criminal proceedings, the petitioner is clothed with all of the fundamental rights, privileges and immunities of a criminal accused. *Matter of Chiovero, supra*. One of those fundamental constitutional rights is the right to not be twice placed in jeopardy.

The Fifth Amendment to the United States Constitution provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The "double jeopardy" provision of the federal constitution is binding upon the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056. 23 L.Ed 2d 707 (1969). Thus, the petitioner's right to not be twice placed in jeopardy is guaranteed by the Federal Constitution as interpreted in *Benton v. Maryland, supra*.

The U.S. Supreme Court has held that a trial court may abort a trial, and the double jeopardy guarantees will not prevent a retrial, where, after considering all of the facts and circumstances, the court finds "there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579 (9 Wheat 579), 6 L.Ed. 165 (1824). In the instant case, no manifest necessity existed for aborting the hearing, and the ends of justice were defeated by terminating the hearings and starting over again.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

> (citation omitted). This prevents a prosecutor from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 LEd. 2d 199 (1957). An accused individual, such as the petitioner in this case, has a "valued right to have his trial completed by a particular tribunal." *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed 2d 416 (1982). That valued right was blatantly violated by the aborting of the original hearing and the hearing ab initio ordered retried by the JIRB to be heard by a different tribunal — a different hearing committee. The Per Curiam Order of October 14, 1992 of two Justices of the Pennsylvania Supreme Court which ordered a reprimand of the petitioner was for Charge I, one of the aforesaid objected to double jeopardy charges.

3. THE JUDICIAL INQUIRY AND REVIEW BOARD'S ACTION IN ADDING THREE NEW, UNRELATED CHARGES (NOS. III, IV AND V) TO THE TWO ORIGINAL CHARGES DURING THE HEARING ON THE ORIGINAL CHARGES DEPRIVED THE PETITIONER OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE UNITED STATES CONSTITUTION

Rule 8 of the Rules of Procedure Governing the JIRB provides:

> The Board at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

Rule 2 of the Rules of Procedure Governing the JIRB provides:

> (a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings should be entitled:
> "Before the Judicial Inquiry and Review Board, Docket No. . . . . ."
>
> (b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within twenty (20) days after service upon him.
>
> (c) The notice shall be served upon the judge by mailing, by prepaid registered or certified mail, a copy of the notice addressed to the judge at his chambers, or if not delivered, then at his last known residence.

The three new charges which were filed as amendments against the petitioner by the Board on October 3, 1988, were later recognized by the JIRB to be new charges in that the said new charges did not "conform to proof or . . . set forth additional facts" developed at the said proceedings as discussed *supra*. The order entered by six members of the Board on October 11, 1988 specifically stated that the said new charges were not Rule 8 "Amendments" but rather were filed pursuant to Rule 2. The so-called "Amended/Reapproved Charges" III, IV and V filed by the Board concerned allegations of wholly unrelated and completely separate conduct of petitioner, alleged to have been carried out by the petitioner some two to four years prior to the time frame of the original charges and allegedly involving separate and distinct parties, dates, times, proceedings and

subject matter.

As noted *supra*, proceedings before the JIRB are quasi-criminal proceedings. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885, (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, (1979). The quasi-criminal nature of the proceedings against the petitioner in this case raises the plethora of all the protections afforded to every person charged with a criminal offense. *Matter of Chiovero*, *supra*; *Judicial Inquiry and Review Board v. Synder*, 514 Pa. 142, 523 A.2d 294, 300-01 (1987) (concurring and dissenting opinion, McDermott, J.) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded at the very least, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.") Additionally, the Pennsylvania Supreme Court has held that the rules of procedure which govern the JIRB must "be meticulously observed." *Matter of Chiovero*, 570 A.2d at 61.

The procedure used by the JIRB in adding three new unrelated charges against the petitioner undoubtedly violated Rules 2 and 8 of procedure governing the JIRB.

Such joinders are also prohibited in civil and criminal proceedings because of prejudice. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *See* Pa. R. Civ. P. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) *Lohmiller v. Widenbaugh, 302 Pa. Super. 174, 448 A.2d 583 (1982), rev'd on other grounds*, 503 Pa. 329, 469 A.2d 578 (1983). See Rule 229 Pa. R. Crim. P.

More importantly, the United States Supreme Court has declared that an accused in a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the accused are *added* during disciplinary proceedings based on evidence *adduced at said proceedings. In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed 2d 1230 (1968); a fortiori the new charges added* to and during the proceedings against the petitioner in these proceedings, totally extraneous to the proceeding and *not adduced at the original hearings,* deprived the petitioner of fair notice, due

process and equal protection per *Ruffalo*.

In the proceedings against the petitioner the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, investigative resources, etc.) most certainly would have been substantially different had the new charges III, IV and V been filed prior to the commencement of the complicated and lengthy proceedings against him. The "absence of fair notice as to the reach of the [JIRB] procedures and the precise nature of the charges deprived the petitioner of procedural due process." *Id.* From the time petitioner received notice of the investigation in July, 1987 and of the charges on May 24, 1988, and up until the time that the new charges were added on October 3, 1988, the petitioner's defense presentation and strategy was at all times designed and molded to conform to the original charges I and II. The petitioner was highly prejudiced and denied due process and equal protection of law by the actions of the JIRB and the Executive Director/Board Counsel-prosecutor Robert L. Keuch in filing new, unrelated and highly inflammatory charges III, IV and V on October 3, 1988 which "new charges" corrupted and polluted the hearing in contravention of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

It is respectfully submitted that for all of the above reasons, review of this matter is appropriate and necessary. The petitioner's rights to due process and equal protection of the law under the Fourteenth Amendment of the U. S. Constitution were repeatedly violated by: (a) the unlawful commingling of the investigative, administrative, prosecutorial and adjudicative functions in the JIRB; (b) the unlawful retrial of the petitioner on charges I and II in violation of his right under the U. S. Constitution to not be twice placed in jeopardy; and (c) the unlawful deprivation of procedural due process by the JIRB unlawfully adding three new charges against the petitioner while the petitioner was sucessfully defending the original two charges.

Finally, a Writ of Certiorari should be granted because the Pennsylvania Supreme Court, acting by and through two justices (of a seven-justice court) has approved of and participated in the denial of the petitioner's rights of due process and equal protection of the law, and his right to be free from double jeopardy, all of which rights are guaranteed to all persons by the United States Constitution. If members of the judiciary are to be uniquely deprived of these fundamental rights, then only this Honorable Court should proclaim that such deprivation is in accord with the United States Constitution. An affirmative proclamation in this regard by this Honorable Court, will inform society of this unique and heretofore unannounced standard and, more particularly, will alert all men and women who aspire to judicial office that, upon becoming a member of the judiciary, the fundamental rights under the Fourteenth Amendment and Fifth Amendment of the United States Constitution which all jurists are sworn to uphold, are forfeited.

Respectfully Submitted,
ROLF LARSEN
2800 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 565-3000